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No. 07-1392

Supreme Court, U.S.
FILED
AUG 12 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LARRY DRUTIS, HAROLD PARKER, JOHN WAYNE SIMPSON, and JOSEPH TKACZ,

Petitioners,

v.

QUEBECOR WORLD (USA) INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RESPONDENT'S SUPPLEMENTAL BRIEF 1

CONCLUSION 3

TABLE OF AUTHORITIES

Cases **Page**

Amara v. CIGNA Corp., 534 F. Supp. 2d 288 (D. Conn. 2008) 2

Bryerton v. Verizon Communications, Inc., No. 06-cv-6672, 40 Empl. Ben. Cas. 1884 (S.D.N.Y. April 17, 2004) 2

Cooper v. IBM Personal Pension Plan, 457 F.3d 636 (7th Cir. 2006), *cert denied*, 127 S. Ct. 1143 (2007) 2

Custer v. Southern New England Telephone Co., No. 05CV1444, 42 Empl. Ben. Cas. 2479 (D. Conn. Jan. 24, 2008) 2

Hirt v. Equitable Retirement Plan, 441 F. Supp. 2d 516 (S.D.N.Y. 2006) 2

Hirt v. Equitable Retirement Plan, Nos. 06-4757 -cv, 06-5190-cv, 07-1680-cv, 2008 WL 2669346 (2d. Cir. July 9, 2008) 2

In re Citigroup Pension Plan ERISA Litigation, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) 1

In re J.P. Morgan Chase Cash Balance Litigation, 460 F. Supp. 2d 479 (S.D.N.Y. 2006) 1

Laurent v. PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) 1

Register v. PNC Financial Services Group, Inc., 477 F.3d 56 (3d Cir. 2007) 2

Richards v. FleetBoston Financial Corp., 427 F. Supp. 2d 150 (D. Conn. 2006).....1

Statutes

29 U.S.C. § 1001 1

29 U.S.C. § 1054(b)(1)(H).....1, 2, 3

RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Respondent Quebecor World (USA) Inc. respectfully submits this Supplemental Brief in support of its Brief in Opposition to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, filed June 9, 2008, to bring to the Court's attention new authority that was not available at the time Respondent filed its Brief in Opposition.

Petitioners seek review of a decision of the Sixth Circuit rejecting their claims that a cash balance plan discriminates against employees on the basis of age in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* The sole basis for the Petition was an asserted conflict between the decision below and three district court decisions, all from the Second Circuit, holding that cash balance plans are inherently age-discriminatory in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). *See Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006); *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006); *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006). Pet. at 7-8.

Respondent pointed out in its Brief in Opposition, at 7-8, that these district court decisions were not only in conflict with two other decisions of the Courts of Appeals, both of which agreed with the court below that cash balance plans are not inherently discriminatory within the meaning of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), *see*

Cooper v. IBM Pers. Pension Plan, 457 F.3d 636 (7th Cir. 2006), *cert denied*, 127 S. Ct. 1143 (2007); *Register v. PNC Fin. Servs. Group, Inc*, 477 F.3d 56 (3d Cir. 2007), but were also themselves in conflict with five other district court decisions within the Second Circuit. *See Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008); *Custer v. S. New Eng. Tel. Co.*, No. 05CV1444, 42 Empl. Ben. Cas. 2479 (D. Conn. Jan. 24, 2008); *Bryerton v. Verizon Commc'ns, Inc.*, No. 06-cv-6672, 40 Empl. Ben. Cas. 1884 (S.D.N.Y. April 17, 2004); *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006); *Hirt v. Equitable Ret. Plan*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006). Respondent further pointed out that this intra-circuit split was about to be resolved, because two of the district court decisions – *Hirt* and *Bryerton* – had been appealed to the Court of Appeals for the Second Circuit and argued on April 22, 2008.

The appeals in *Hirt* and *Bryerton* have now been decided, and the intra-circuit split has been resolved. On July 9, 2008, in *Hirt v. Equitable Ret. Plan*, Nos. 06-4757-cv, 06-5190-cv, 07-1680-cv, 2008 WL 2669346 (2d. Cir. July 9, 2008), the United States Court of Appeals for the Second Circuit joined the Courts of Appeals for the Third, Sixth and Seventh Circuits in holding that cash balance plans do not inherently discriminate on the basis of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H).

Because the three district court decisions from the Second Circuit were the *only* outstanding decisions to hold that cash balance plans discriminate on account of age in violation of ERISA

§ 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), and those decisions have now been reversed, there is no longer any basis whatsoever for the Petition, and it should, therefore, be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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August 2008

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